(4)

CASE NO. 91 1082

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PHILIP E. FOSTER,
Petitioner,

v.

RUTGERS, THE STATE UNIVERSITY,
et al.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

CHRISTOPHER J. CAREY, ESQ.
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The American Association of
University Professors

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STATEMENT OF THE CASE

The American Association of University Professors (hereinafter "the Association") does not adopt the petitioner's Statement of the Case since many of the facts set forth are not within the knowledge of the Association. However, with respect to the Association, there are many inaccuracies and omissions in the petitioner's Statement of the Case.

The petitioner is seeking review of the lower court's determination dismissing his Complaint on the basis that he failed to timely serve the Summons and Complaint on the respective defendants. The petitioner's Complaint was filed on August 24, 1988 (Pb 15) and pursuant to Fed. R. Civ. P. 4(j) service must have been duly completed by December 22, 1988. The Summons, Complaint and Form 18-A in this matter were sent to the Association's offices in Washington, D.C. by United States first-class mail. The Association received the package on December 28, 1988. (Appendix

3a). According to the undisputed evidence, the Postal Service did not require that the package be signed for and the return receipt was still affixed to the envelope when it was delivered. The return receipt was not taken back by the Postal Service. (Appendix 3a-4a). The petitioner never attempted to serve the Association at any later date or in any other manner.

Therefore, the Association was not served within the time period designated by Fed.R.Civ.P. 4(j).

SUMMARY OF ARGUMENT

The petitioner has sought this Court to address the procedural issue of when service of process is made. Although service of process was not completed within 120 days, as required by the Federal Rules of Civil Procedure, the petitioner argues he mailed the Summons and Complaint to the respective defendants within 120 days, therefore service was

timely made. However, the petitioner relies upon case law which is inapposite and readily distinguishable from the instant facts.

Additionally, the petitioner also incorrectly argues that there is a split in the circuits regarding the instant service of process issue. The case law which the petitioner cites, however, discusses a different issue which is readily distinguishable from his failure to serve the Association within the 120 day time frame. Moreover, the petitioner has not demonstrated that his failure to serve the Association timely with process was based upon "good cause"; thereby providing relief from the 120 day requirement.

Finally, the Third Circuit applied the correct standards in determining whether a "reasonable inquiry" was made by the Association prior to the filing of their motion to dismiss the Complaint. This determination resulted in the denial of the petitioner's motion for Rule 11 sanctions.

ARGUMENT

1. Service of a Summons and Complaint is not made within the meaning of Fed. R. Civ. P. 4(j) when service is attempted under Fed. R. Civ. P. 4(c)(2)(C)(i).

First, the petitioner argues that pursuant to Fed. R. Civ. P. 4(c)(2)(C)(i) he attempted service under New Jersey's Court Rule 4:4-4 and, therefore, the 120 day requirement of Fed. R. Civ. P. 4(j) is inapplicable. In its opinion, the District Court specifically considered this question and held that while Fed. R. Civ. P. 4(c)(2)(C)(i) permits the election of the State method for making service, "it does not provide that the plaintiff will then be governed by all of the state rules for perfecting service." [Pa 72]. Therefore, the District Court held the 120 day requirement of Fed. R. Civ. P. 4(j) was still applicable. This ruling was affirmed by the Third Circuit (Pa 62 to 63).

The District Court's decision was correct because Fed. R. Civ. P. 4(c)(2)(C)(i) merely governs the manner of service of process and does not supersede the time limit for service addressed in subsection 4(j). The petitioner completely ignores Fed. R. Civ. P. 1 which states:

> These rules [Federal Rules of Civil Procedure] govern the procedure in the United States District Courts in all suits of the civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Therefore, the District Court was duty-bound to follow the provisions of the Federal Rules of Civil Procedure and did not err.

Second, assuming arguendo, that service may be perfected in accordance with state rules and without addressing whether the petitioner's manner of service conformed with New Jersey's State Court rules, the petitioner failed to comply with N.J. Ct. R. 4:4-1 which states:

> The plaintiff, his attorney or the clerk of the court may issue the summons. If a summons is not issued within 10 days after the filing of the Complaint the action may be dismissed in accordance with R. 4:37-2(a)...

For the purpose of this rule, issuance of the Summons is interpreted to include service of process upon an adverse party. Tall Timbers Property Owners Ass'n. v. Tall Timbers, Inc., 217 N.J. Super. 119, 123, 524 A.2d 1315 (App. Div. 1987) questioned on other grounds, Cogdell v. Hospital Center at Orange, 116 N.J. 7, 560 A.2d 1169 (1989). Therefore, in the instant action since the Summons was "issued" to the defendants well over 10 days after the filing of Complaint, petitioner failed to comply with New Jersey's Court Rules.

Third, the petitioner relies on West v. Conrail, 481 U.S. 35 (1987) and Walker v. Armco Steel Corp., 446 U.S. 740 (1980) for the proposition that the statute of limitations is tolled when the Complaint is filed. Therefore, the petitioner argues, since his Com-

plaint was timely filed, his action is still viable pursuant to his interpretation of West and Walker. However, those cases are completely inapplicable to the instant action. While in those cases the Court discussed whether a suit is commenced for purposes of tolling the applicable statute of limitations upon the filing of the Complaint, without regard for the date of the service of process, West, 481 U.S. at 39, Walker, 446 U.S. at 741, 748, the petitioner failed to inform this Court that service of process in both of those cases occurred well within the 120 day time limit as established by the Federal Rules of Civil Procedure. West, 481 U.S. at 36 (service of process upon the last defendant occurred 62 days after filing the Complaint); Walker, 446 U.S. at 742 (service of process upon the last defendant occurred 104 days after filing the Complaint).

Therefore, although those cases discussed the tolling of the statute of limi-

tations by the filing of a Complaint, in both cases this Court considered matters which, unlike the present action, had been commenced in accordance with the parameters set forth in Fed. R. Civ. P. 4(j).

Finally, the petitioner asserts that service of a Summons and Complaint is complete upon mailing, and since he mailed his Summons and Complaint within the 120 day time limit, he had achieved service of process within the parameters established by Fed. R. Civ. P. 4(j).

As the District Court stated in its opinion:

> Under Third Circuit law, service of process under Fed. R. Civ. P. 4(c)(2)(C)(ii), the rule which allows for service by mail, is complete when the defendant signs and returns form 18-A. Stranahan Gear Co. v. NL Industries, Inc., 800 F.2d 53, 56-57 (3d Cir. 1986); Green v. Humphrey Elevator and Truck Co. and Maintenance Co., 816 F.2d 877, 881 (3d Cir. 1987); Braxton v. United States, 817 F.2d 238, 240 note 1 (3d Cir. 1987). Therefore, in this circuit, the individual making the complaint must mail process and receive the form from defendant within

120 days of filing the Complaint. (Pa 68-69).

Thus, in the Third Circuit mere mailing of the Summons and Complaint does not constitute completed service.

Therefore, the present Petition for Certiorari should be denied because service of process is not achieved merely upon mailing the Summons and Complaint to the defendants and service of process was not completed within 120 days as required by the Federal Rules of Civil Procedure.

2. The Third Circuit's decision regarding of when service is made within the meaning of Fed. R. Civ. P. 4(j) does not conflict with New Jersey case law.

Petitioner claims a conflict exists between the Federal Rules of Civil Procedure and decisions of the New Jersey Supreme Court. In this argument, the petitioner relies principally on County v. Pacific Coast Borax Co., 67 N.J.L. 48, 50 A. 906 (Sup. Ct. 1902), aff'd

68 N.J.L. 273, 53 A. 386 (E. & A. 1902) to demonstrate this alleged conflict. Such reliance is plainly misplaced.

By the petitioner's own admission, Pacific Coast Borax Co. was decided long before the enactment of the present New Jersey Court Rule 4:4-4(a)(2) which now permits service by mail. Additionally, Pacific Coast Borax Co. did not stand for the proposition that service was made at the time the Summons had been delivered to the Sheriff as the petitioner has inferred. Instead, that case stated that the applicable statute of limitation was tolled on the date which the "process was issued in good faith for the purpose of being served," assuming that service was thereafter properly made. Pacific Coast Borax Co., 67 N.J.L. at 54.

Therefore, the petitioner's argument that a conflict exists between the decisions of the Third Circuit and the New Jersey Supreme Court is baseless. In fact, the New

Jersey Court Rules, as promulgated by the New Jersey Supreme Court, provide that service of the Summons and Complaint must be accomplished within 10 days, N.J. Ct. R. 4:4-1, and, if attempted to be served by mail, personal service must follow any ineffective mail service after 60 days. N.J. Ct. R. 4:4-4(a)(1). Although the time frames under the New Jersey Court Rules are abbreviated, this method of service is in accordance with the spirit of the provisions of Fed. R. Civ. P. 4.

Based upon the foegoing, there is no conflict between the decisions of the Third Circuit and the New Jersey Supreme Court.

3. Service of a Summons and Complaint is not made within the meaning of Fed. R. Civ. P. 4(j) when service is attempted under Fed. R. Civ. P. 4(c)(2)(C)(ii).

For the reasons set forth in full in Point I supra, the Association urges this Court to deny the present Petition for Certio-

rari because service of a Summons and Complaint made by mail is complete upon receipt of the Summons and Complaint and return of the signed acknowledgment by the defendant. Where the acknowledgment is not returned, service is made and complete upon personal service on the defendant. Green v. Humphrey Elevation and Truck Co., 816 F. 2d 877, 881 (3rd Cir. 1987). Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984); Armco v. Penrod-Stauffer Bldg. Syst., 733 F.2d 1087, 1089 (4th Cir. 1984).

Although Fed. R. Civ. P. 5(b) states that "service is complete upon mailing", section (a) of that same Rule requires "...every pleading subsequent to the original complaint...shall be served upon each of the parties." Unfortunately, the petitioner seems to have misapplied the concepts set forth in Fed. R. Civ. P. 5 to the operations of Fed. R. Civ. P. 4. This confusion cannot form a basis for a Petition for Certiorari and a review by this Court.

Based upon the foregoing, the Association urges this Court to deny the present Petition for Certiorari because it did not receive the Summons and Complaint within 120 days after the Complaint had been filed.

4. The Third Circuit's decision of when service is made within the meaning of Fed. R. Civ. P. 4(j) does not conflict with decisions of the U.S. Supreme Court.

By the petitioner's own admission, prior to 1982 the service of Summons and Complaint in the Federal District Court had to be made by the U.S. Marshall. The cases cited in the petitioner's argument all predate 1982 and consider situations where the Complaint had been filed prior to the expiration of the applicable statute of limitation, but had not been served until after the statute expired. Linn & Lane Timber Co. v. United States, 236 U.S. 574, 578 (1915); Maier v. Independent Taxi Owners Ass'n, 96 F.2d 579 (D.C. Cir.

1938); Equitable Ass. Co. v. Schwartz, 42 F.2d 646 (5th Cir. 1930); United States v. Northern Finance Corp., 16 F.2d 999 (2d Cir. 1927). These factual scenarios are completely opposite to the present situation.

The instant case involves a plaintiff/petitioner, who through his own inattention, for which he offers no excuse, failed to serve his Summons and Complaint upon the Association within the 120 day time frame allowed under Fed. R. Civ. P. 4(j). To compare delivery of a Summons and Complaint to the U.S. Marshall for service as required under the earlier Federal Rules of Civil Procedure with mailing a Summons and Complaint just prior to the expiration of the 120 day time limit under the present Federal Rules of Civil Procedure is disingenuous at best.

Based on the foregoing, the petitioner's arguments are without merit.

5. There is no split in the Circuits as to when service of a Summons and

Complaint is made within the meaning of Fed. R. Civ. P. 4(j).

The petitioner incorrectly claims there is a split in the circuits regarding the issue of when service of a Summons and Complaint is made within the meaning of Fed.R.Civ.P. 4(j) based upon his misreading of the Second Circuit's opinion in Morse v. Elmira Country Club, 752 F.2d 35 (2d Cir. 1984). The Petitioner contends that Morse holds that service is made when the Summons and Complaint is mailed. However, Morse actually states:

> ...Congress substituted the current system, of mail delivery followed by acknowledgment or personal service, to insure that defendant would always receive actual notice.
>
> Under the original version of the rule [Fed. R. Civ. P. 4(c)(2)(C) prior to 1983], effective service was complete upon mailing; all defendant needed to produce in order to obtain a default judgment was the returned envelope plus another mail delivery. When Congress changed the particulars of the initial mailing and substituted personal service as a follow-up, it gave no indication

> that it intended to change the prior view that mail service was effective where the recipient received the mail and accordingly received actual notice. That is our position in this case, a position consistent with the wording and legislative history of Rule 4. (emphasis added).

Id. at 41. Additionally, the defendant in the Morse case was served within the 120 day time frame of Fed. R. Civ. P. 4(j). Id. at 36. This fact alone makes the Morse case inapplicable to the present situation.

The difference of opinion between the circuits instead focuses on when service is made pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) and defendant fails to return the acknowledgment within the designated time period. Under these conditions, the question then becomes whether the mailing can stand as effective service of process by simply treating it as made in accordance with a state-law method. Combs v. Nick Garin Trucking, 825 F.2d 437, 448 (D.C. Cir. 1987). As the Combs

Court stated when considering a possible split in the circuits:

> One could argue that Armco [v. Penrod-Stauffer Bldg. Syst., 733 F.2d 1087 (4th Cir. 1987)] and Morse are reconcilable by virtue of the latter case's focus on statute of limitations issues. Because, however, the timeliness of the action in Morse was grounded on the court's determination that mail service had been achieved under Rule 4, we doubt that the cases can be harmonized in this fashion. The Morse court itself described Armco as "inapposite," seemingly viewing Armco as a ruling that a plaintiff must use personal service to obtain proof of a prior mail service in the absence of a returned acknowledgment, but not as holding that the acknowledgment was a prerequisite to effective mail service. This supposed distinction, however, rests on a faulty understanding of the facts in Armco; as the Fourth Circuit noted "[n]o other service of process was attempted" aside from the unacknowledged mailing. Thus, these decisions cannot be squared; they reflect antithetical readings of [Fed.] Rule [Civ. P.] 4(c)(2)(C)(ii), and we must consider each carefully before making any choice between them. (emphasis in the original).

Combs, 825 F.2d at 445-46.

The distinction which the petitioner uses as the basis for his Petition is whether

service by mail is valid if the acknowledgment of service is not returned. This distinction does not even closely resemble the scenario described in the Petition. In fact, none of the cases cited in the Petition even consider if service was made upon mailing or upon receipt.

Based on the foregoing, the Association urges the Court to deny the Petition for Certiorari because the possible split in the circuits is not applicable to the present case, especially since the Association did not receive service of process within the 120 day time limit.

6. The Third Circuit applied the correct standards in determining whether the pleadings alleged "good cause" within the meaning of Fed. R. Civ. P. 4(j).

Although the petitioner asserts that both the District Court and the Third Circuit failed to apply the correct standard in deter-

mining "good cause" under Fed. R. Civ. P. 4(j) in order to obtain relief from the 120 day time limit, he has consistently provided no basis for those Courts to find otherwise.

The "good cause" exception was enacted to protect diligent plaintiffs who made every effort to comply with Rule 4(j), but nonetheless, did not. Green v. Humphrey Elevator & Truck Co., 816 F.2d 877, 880 (3d Cir. 1087). By the petitioner's own admission, he waited 117 days before mailing the Summons and Complaint. This can hardly be considered due diligence and is not excusable neglect as provided for in Consolidated Freightways Corp. v. Larson, 827 F.2d 916, 919 (3d Cir. 1987). Throughout this litigation, the petitioner has not proffered one iota of proof that the District Court did not have good cause to dismiss his Complaint and the Third Circuit did not err in its review of the District Court.

Based on the foregoing, the Association urges this Court to deny the present

Petition for Certiorari since the plaintiff/petitioner's conduct in attempting to serve the Summons and Complaint on this defendant did not fall within the "good cause" exception of Fed.R.Civ.P. 4(j).

7. The Third Circuit applied the correct standards in determining whether "reasonable inquiry" within the meaning of Fed. R. Civ. P. 11 had been shown.

Although the petitioner asserts that the District Court and the Third Circuit applied the incorrect standard in his application for Fed. R. Civ. P. 11 sanctions against the Association, he has never stated what standard should have been applied and how this Court should have settled any dispute which may have existed. Instead, he seems to imply that because he is a pro se plaintiff, although an attorney admitted to the Bar of the State of New York, he should be afforded

special treatment and leniency in his pleadings.

Additionally, because the petitioner implies that the Association should have accepted mail service or not filed its motion to dismiss for improper service of process, he levies blame on the Association for the pursuit of its own legal rights. This certainly cannot serve as the basis for a Petition for Certiorari by this Court.

Furthermore, throughout the entire litigation, he has never stated what is a "reasonable inquiry" despite the existence of a plethora of decisions to provide such guidance.

Therefore, based on the foreoging, the Association urges this Court to deny the petitioner's request for a Writ of Certiorari.

CONCLUSION

Based upon the foregoing, the Association respectfully request that the Petition for Writ of Certiorari be denied.

Christopher J. Carey
Counsel of Record

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The American Association of
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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
HONORABLE H. LEE SAROKIN
CIVIL ACTION NO. 88-3692

PHILIP E. FOSTER,

Plaintiff,

v.

RUTGERS, THE STATE THE UNIVERSITY; THE RUTGERS COUNSEL OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS; THE PERMANENT PANEL ON PROCEDURES; AND THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,

Joint and Several
Defendants.

AFFIDAVIT OF ALESIA POPE

CITY OF WASHINGTON :
SS.
DISTRICT OF COLUMBIA:

I, ALESIA POPE, being duly sworn, depose and say as follows:

1. I am the receptionist employed by the American Association of University

Professors ("AAUP") and have first-hand knowledge of the facts recited in this affidavit.

2. I have worked as the receptionist at the AAUP for four years.

3. When the AAUP mail clerk is on vacation, I am in charge of opening all of the mail which comes to the AAUP.

4. On December 28, 1988, the AAUP mail clerk was on vacation and I therefore was charged with opening all of the mail that day.

5. On December 28, 1988 we received a 9 1/2" by 12 1/2" envelope with a return address of P. Foster, 23 East 81, NYC, NY.

6. On the back of the envelope was a green 3 1/2" by 7" form called "Domestic Return Receipt."

7. I was not asked to sign for the delivery of the envelope.

8. The envelope contained a court complaint captioned Philip E. Foster v. Rutgers, The State University; et. al.

9. A copy of the envelope and complaint is attached hereto as Exhibit A.

Further, the affiant saith not.

S/Alesia Pope
Alesia Pope

Subscribed and Sworn to
before me this 13th day of
January, 1989.

S/Dolous R. Bensted
NOTARY PUBLIC

My commission expires:

10/31/89

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHILIP E. FOSTER,

Plaintiff,

-against- 88 Civ. 3692(HLS)

RUTGERS, THE STATE THE UNIVERSITY, et al.,

Defendants.

NOTICE AND ACKNOWLEDGEMENT
OF RECEIPT OF SUMMONS AND COMPLAINT

TO: [Insert name and address of party to be served.]

Defendant, A.A.U.P.

The enclosed Summons and Complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to sender within 35 days.

You must sign and date the acknowledgement. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a Summons and Complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 35 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgement of Receipt of Summons and Complaint will have been mailed on.

_____ _____
Signature Date of Signature

ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS OF COMPLAINT

I declare, under penalty of perjury, that I received a copy of the Summons and Complaint in the above-captioned matter at [Insert Address] _____

_____

_____ _____
Signature Date of Signature

_____
Print Name

_____
Relationship to entity/
Authority to Receive
Service of Process